Supreme Court of the United States.

OCTOBER TERM, 1899.

Nos. 107 and 143.

E. F. BLACK, *Appellant*,
v.
WALTER P. JACKSON.
and
J. C. POTTS, *Appellant*,
v.
THOMAS N. HOLLEN.

BRIEF FOR APPELLEES.

STATEMENT.

These two cases, which by agreement, are to be heard by this Court together, come up by appeals from the Supreme Court of Oklahoma Territory, which court affirmed the decrees of the District Court of Kay County, in said Territory. The appellees have filed motions in the respective cases, to dismiss the appeals for want of jurisdiction, and insist that

their motions should be sustained, but will also file a short brief on the merits.

In the case of *Black* v. *Jackson*, the facts are stated in the opinion of the Territorial Supreme Court, found in the record, pages 16–19.

In *Potts* v. *Hollen*, the facts are set out in the opinion of the Oklahoma Supreme Court on pages 15–17, of record of that case.

Each of the appellees in these two cases has a homestead entry on the land involved in his case, and the respective claims of the appellants have been decided by the Land Department adversely to them.

The real question in each case before the Land Department was the qualification of the appellees herein respectively, to make homestead entry in what was the Cherokee Outlet, that part of Oklahoma Territory opened to settlement September 16, 1893, under the act of Congress approved March 3, 1893. (27 Stats., 640.) The disqualification alleged against each was that he made the race on the day of the opening of the Outlet from the south side of the Chillocco Indian Industrial School Reservation, which is a block of land 4½ miles long east and west and 3 miles deep, reserved out of the north end of the Cherokee Outlet by Executive order in 1884, for an Indian Industrial School, since which time it has in no sense been a part of the Cherokee Outlet. The treaty, by the terms of which the United States acquired absolute title to the Outlet, was made December 19, 1891, more than 7 years after the date of the said Executive order. The Act of Congress providing for the opening of the outlet for settlement, expressly declared that the Chillocco Indian Industrial School lands should "not be subject to public settlement, but shall, until further action of Congress, continue to be reserved for the purposes for which they were set apart in the said Executive order." (27 Stats., 642.)

ARGUMENT.

In neither of the cases is the title to the land decribed in pleadings involved. In both instances the title remains in the United States, and is wholly and exclusively within the jurisdiction of the Land Department. That Department has, in both of the cases, adjudged that the appellees are, as against the appellants, entitled to make homestead entry of the lands by them respectively claimed. A homestead entryman, in order to earn a patent to the land entered, must reside on it for a period of not less than five years and must cultivate and improve it. A failure on the part of a homestead entryman to occupy the land, and maintain his residence thereon continuously for five years, to the exclusion of a residence elsewhere, renders his entry liable to cancellation; so also, a failure to cultivate and improve the land included within his entry, works a forfeiture of the entry.

Upon the sworn declaration of the entryman that "he will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for," is his entry allowed. The Land Department has adjudged that each of the appellees in these cases has a right to make entry of the land claimed by him, and that such right in him is superior to that of his adversary, and accordingly in the case of *Black* v. *Jackson*, the Department canceled Black's entry and awarded the right of entry to Jackson, which he, in due time exercised, but Black refuses to leave the land, and persists in occupying a part of the tract, and otherwise interferes with the possession thereof by Jackson. Black is insolvent and financially wholly irresponsible.

In the case of *Potts* v. *Hollen*, the entry was made in the first place by Hollen, and after Hollen had made his entry, Mrs. Potts contested it on the alleged ground that Hollen had disqualified himself to make said entry by making the race

on the day of the opening, from the south side of the Chilocco reservation. She never had a legal settlement on the land.

The Land Department decided that contest in Hollen's favor, holding his entry intact. Mrs. Potts in the meantime had unlawfully intruded herself on the land, and was a trespasser thereon when the original suit in this case was brought against her.

The Land Department possesses no such judicial powers as are necessary to protect an entryman in his right of possession to the land included within his entry.

There can be no other recourse, therefore, for the protection of the possessory rights of an entryman than the courts.

As stated above, one who applies for and is granted a homestead entry, assumes certain obligations to the United States, and the Government confers on him the right to occupy, use and enjoy the land entered. The United States retains the legal title to the land as a security that the entryman will comply with his obligations. The right in the entryman to possess the land as against all other persons, is an absolute necessity to enable him to perform his part of the contract.

QUESTIONS INVOLVED.

Counsel for the appellants in their brief in case of *Black* v. *Jackson* lay down four questions or propositions, which they insist are involved in that case, and which they argue in their order, as follows:

"First. That courts of general jurisdiction are not vested with authority, either in law or in equity, to settle the rights of claimants, of the character involved here, to the possession of the public lands, while the title to the same remains in the United States."

"Second. That if such jurisdiction subsists, it falls within the province of a court of law and not a court of equity."

Third. If such jurisdiction be conceded to exist in a court of equity, it is to be administered upon equitable principles, and such court will not lend its aid to a party who by his own wrong and fraud has secured an illegal and unjust advantage.

"Fourth. That the Department of the Interior was clearly mistaken in its application of the law to the facts of the case, the Chilocco Indian reservation being a part of the inhibited country into which intending settlers were not allowed to enter, and the plaintiff in the court below is therefore disqualified from acquiring title to the land in controversy and should be treated as a wrong-doer by the denial of any affirmative equitable relief."

I.

The Land Department having in due course of procedure decided in each of these cases, that the appellee is entitled to make entry of the land claimed by him, his right to the exclusive possession of the land embraced in his entry made pursuant to the adjudication of the Department, follows as a necessary legal sequence. The right of possession is a property right, which the courts will protect, pending the final determination of the title.

This Court said in *Marquez* v. *Frisbie*, 101 U. S., 473, on page 475, referring to what the court said in *Johnson* v. *Towsley*, 13 Wall., 72, and *Shepley* v. *Cowan*, 91 U. S., 330:

"We did not deny the right of the courts to deal with the possession of the land prior to the issue of the patent."

If after the entry of a homestead has been made, the entryman could not appeal to the courts for protection against those who might invade his homestead, and who

could thereby prevent the entryman from residing upon, and cultivating the land in accordance with the requirements of the homestead law, a right, most important both to the individual, and the Government, would be liable to be destroyed, without any remedy whatever. The contention of counsel on this point is too abhorrent to all ideas of justice and too fraught with evil consequenses to justify an extended consideration thereof, and I pass to their second proposition, which is, that if there is any jurisdiction in the courts to protect an entryman in his possessory rights to his homestead, that it is at law and not in equity.

II.

NATURE OF THE ENTRYMAN'S RIGHT.

In the first place the right of a homestead entryman is an imperfect equity. He has no legal title to the land entered; that remains in the United States, subject to the rights of the Government under the homestead law, and the question of the entryman's ultimately acquiring title is dependent upon his compliance with the law, and finally paying the price fixed by law for the purchase of the land. It is the enjoyment of this equity which is sought to be protected in both the cases at bar.

THE ALLEGATIONS OF THE BILL.

It is alleged in the bills (called in Oklahoma petitions), that each of the defendants therein (appellants in this Court) is in possesion of a part of the respective homesteads, and wrongfully holds such possession and refuses to vacate the and, notwithstanding the Land Department has awarded the right of entry thereof to the plaintiff; that the defendant is trespassing on the land, and that he is insolvent.

The prayer of each bill is substantially that the Court enjoin the defendant from entering upon or in any way trespassing upon or using any portion of the land embraced in the homestead entry of plantiff, and from removing or destroying the fence, wells, or other improvements on the land which are permanently attached thereto.

The Interior Department and this Court have unifomly held, that anyone who goes upon a homestead for which another holds a valid entry, is a mere trespasser, and can acquire no rights by such trespass. *McMichael* v. *Murphy*, 20 L. D., 147.; *Sturr* v. *Beck*, 133 U. S., 548.; *Atherton* v. *Fowler*, 96 U. S., 513.; *Hosmer* v. *Wallace*, 97 U. S., 575.; *Hastings etc. R. R. Co.* v. *Whitney*, 132 U. S., 357.

Under the allegations of the bills or petitions in these cases, the defendants were wrongfully holding possession of parts of the land involved, under an assertion of an illegal claim to the whole tract. The claim of each of the plaintiffs went to the whole of the tract, and not only to the part actually held by him. The case is quite a different one to that where the party proceeded against only asserts a right or claim to so much of the land as is actually held or occupied by him. The conduct of the defendants under the allegation in the petitions was calculated to do an irreparable injury to the entrymen, by not only depriving them of the occupancy and cultivation of the land, which they had sworn they would reside on and cultivate for a period of five years, but also of depriving them of the means of acquiring the money necessary to pay for the land at the end of five years.

This question is exhaustively discussed in *Woodruff* v. *Wallace*, 3 Oklahoma Rpt. 355, to which, and the authorities therein cited, I respectfully invite the attention of the Court. On page 371, will be found the occupying claimant's act of Oklahoma, followed by a discussion of the same.

JURISDICTION TO ISSUE A MANDATORY INJUNCTION.

In addition to the authorities cited in *Woodruff* v. *Wallace*, *supra*, and *Sproat* v. *Durland*, 2 Oklahoma, 25, I call attention to the following authorities:

In Re Lennon, 166 U. S., 548-556, and cases therein cited; 2 Story's Eq. Jus. (3 ed.) page 261, Sec. 959, and notes thereto; 3 Pomeroy's Eq. Jus. (2 ed.) page 2093, Sec. 1359, and notes thereto.

III.

The third proposition laid down by counsel for appellants, involves the consideration of a question that was not before the court below, and could not be, viz., the qualification of the appellees to make their respective entries. The Land Department, it is conceded, found both of the appellants qualified to make entry of their respective homesteads. This was the judgment of the Land Department on the facts before it. If in this it erred, that error can only be corrected by the courts after patents shall issue. The jurisdiction of the Land Department over the *title* to the land is absolute and exclusive, so long as the title remains in the United States, nor does any action had by the Land Department become final so long as the title does remain in the United States; all of its rulings and judgments are, in their nature, interlocutory, and may be reviewed and set aside at any time, until the patent is actually issued. *Aspen Consolidated Mining Co.* v. *Williams*, 27 L. D., 1, and cases of this Court therein cited. It follows that the Land Department yet has the jurisdiction to correct any errors, either in fact or of law, that it may have made in reference to the qualifications of the entryman, and that the courts have no such jurisdiction until the patents shall issue. *United States* v. *Schurz*, 102 U. S., 378.

IV.

The answer just made to the third proposition of Appellees applies with equal force to their fourth proposition.

It has too often been decided by this Court that the sole and exclusive jurisdiction for the disposition of the public domain is vested in the Land Department, and that the courts cannot and will not control the Land Department in its disposition of the public lands, to admit of discussion. The court's power over title to the public lands never attaches until the titles have passed out of the United States. Then, if the Land Department has erred in its application of the law to the facts, or if it has been imposed upon by fraud, the courts may be appealed to correct such errors, or set aside titles acquired by fraud. *Smelting Co.* v. *Kemp*, 104 U. S., 636; *New Orleans* v. *Paine*, 147 U. S., 261; *Michigan Land and Lumber Co.* v. *Rust*, 168 U. S., 589; *Williams* v. *United States*, 137 U. S., 514.

CONCLUSION.

Should the motions filed by the appellees to dismiss these cases for want of jurisdiction be overruled, and the jurisdiction of this Court upheld, yet it is insisted that the merits of the controversy are with the appellees in each case.

If the Court shall find that the value of the subject-matter of these suits is respectively sufficient to give it jurisdiction, then, in that event, there can possibly be but one question for its consideration, and that is whether the remedy of the appellees was in equity, or at law.

This Court said in *Tyler* v. *Savage*, 143 U. S., 79, that the remedy at law to exclude equity must be as *practical* and *efficient* to the ends of justice and its prompt administration as the remedy in equity, and in *Kilbourn* v. *Sunderland*, 130 U. S., 505, that the jurisdiction in equity attaches unless

the legal remedy *both in respect to the final relief*, and the mode of obtaining it is as efficient as the remedy in equity. Again, equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy, where the injury is destructive or of a continuous character, irreparable in its nature. *Osborne & Co.* v. *Missouri P. R. Co.*, 147 U. S., 248.

A proceeding by unlawful detainer could not give full relief against the wrongful acts of the defendant—it would not prevent removal of permanent improvements on the land; it would not stop the destruction of timber; it would not put an end to the trespassing of the defendant on the homestead of the plaintiff. The final relief by an action of unlawful detainer would not be as complete or as efficient as the remedy invoked in equity.

The reasoning on this point in *Woodruff* v. *Wallace*, *supra*, seems to me perfectly unanswerable.

All the questions involved in the cases at bar are elementary, and exceedingly simple. I therefore forbear discussing them further, and especially as the appellant, Potts, has filed no brief to sustain her appeal, or made answer to the motion to dismiss her appeal.

FRED BEALL,
Attorney for Walter P. Jackson and Thomas N. Hollen,
Appellees.